



Date: February 2, 1998

In the Matters of:

FRANCIS KELLOGG, Employer,

on behalf of

Case No.: 94-INA-465

CELILIA DEL CARMEN MEDINA, Alien.

THE WINNER'S CIRCLE, Employer,

on behalf of

Case No.: 94-INA-544

MANUEL MARIA LUDIZACA, Alien.

**NORTH CENTRAL ORGANIZED REGIONALLY
FOR TOTAL HEALTH, Employer,**

on behalf of

Case No.: 95-INA-68

TAIWO FASORANTI, Alien.

Appearances:

HARRY L. SHEINFELD, for the Certifying Officer
JOHN J. HYKEL, for North Central Organized Regionally for Total Health
WILLIAM PRYOR, for The Winner's Circle
STEVEN CLARK, DAVID STANTON, AND LESLIE DELLON,
for *Amicus*, American Immigration Lawyers Association

Before: BURKE, GUILL, HOLMES, HUDDLESTON, JARVIS, NEUSNER,
ROSENZWEIG, VITTONI AND WOOD, Administrative Law Judges

RICHARD E. HUDDLESTON, Administrative Law Judge

DECISION AND ORDER

This alien labor certification proceeding arises under section 212(a)(5)(A) of the Immigration and Nationality Act of 1990, 8 U. S. C. § 1182(a)(5)(A), and the regulations promulgated at 20 C.F.R. Part 656. It involves the *en banc* consideration of three applications, each of which was denied by the Certifying Officer (CO) on the ground that an alternative job requirement was unduly restrictive in violation of 20 C.F.R. § 656.21(b)(2).¹ In each of these cases we note that the alien does not meet the primary job requirements, but only potentially qualifies for the job offered because the employer has chosen to list alternate education or experience requirements.

The Certifying Officer has requested *en banc* review in these cases in order to permit a more full and complete assessment of the use and misuse of alternative job requirements. Panel decisions have considered the use of alternative requirements, but we are aware of no *en banc* decisions. In *Best Luggage, Inc.*, 88-INA-553 (Nov. 1, 1989), a panel of this Board held that an experience requirement is not unduly restrictive where it is merely an alternative to the experience in the job offered, and it is appropriate to and related to the job. In *Systems International, Inc.*, 92-INA-60 (Aug. 24, 1993) and *Henry L. Malloy*, 93-INA-355 (Oct. 5, 1994), panels held that where the primary requirements are entirely straightforward, not unduly restrictive, and a careful reading of the alternative requirements shows them to be expansive rather than restrictive, the alternative requirements are not unduly restrictive. In *Third Choice, Inc.*, 93-INA-529 (Dec. 30, 1994), the panel found that where the alien's qualifications are matched to the alternative requirement but there are other equally related occupations, an employer may be required to explain why other equally related occupations could not be accepted qualifying related experience.

In each of the cases before us, panels of this Board reversed the CO's denial of labor certification on the ground that Employer's alternative requirements had the effect of expanding the pool of qualified applicants, and therefore were not unduly restrictive. In *Francis Kellogg*, the panel remanded the matter to the CO because it was not clear that the alien was qualified for the position under Employer's alternate requirements. In the other two cases, the panels directed that certification be granted. The CO's petitions for *en banc* review in each of the cases were granted, and the Board has consolidated the matters for decision because of the similarity of the legal issues involved.

¹ The regulation at 20 C.F.R. § 656.21(b)(2) provides:

- (2) The employer shall document that the job opportunity has been and is being described without unduly restrictive job requirements:
 - (i) The job opportunity's requirements, unless adequately documented as arising from business necessity:
 - (A) Shall be those normally required for the job in the United States;
 - (B) Shall be those defined for the job in *Dictionary of Occupational Title (D.O.T.)* including those for subclasses of jobs;
 - (C) Shall not include requirements for a language other than English.

STATEMENT OF THE FACTS

Kellogg

In *Francis Kellogg*, 94-INA-465, Employer seeks a live-in cook, and listed as minimum job requirements two years experience in the job offered or two years experience in the related occupation of live-in housekeeper with cooking experience (KAF at 8).² In the Notice of Findings (NOF)(KAF at 38-41), the CO states:³

Although employer's requirement for two years experience in the job offered (Cook) meets the Specific Vocational Preparation (SVP) requirement of one to two years of experience, the related experience requirement of two years as a Houseworker, General exceeds the SVP requirement and is therefore, excessive and restrictive (KAF 39).

The CO then permitted Employer to rebut by "reducing requirements in the related occupation to the *D.O.T.* standard," or by documenting the business necessity⁴ of the alternative experience requirement.

In rebuttal, Counsel for the Employer argued that the alternative experience requirement was not unduly restrictive in light of *Best Luggage, Inc.*, *supra*.⁵ Further, Counsel noted that the SVP for the position of "housekeeper" is 3 months, but that the position being offered is that of household cook, which has an SVP of up to 2 years. Therefore, it was argued that the issue of whether the alternative experience is restrictive is not relevant (KAF at 44-45). In the Final Determination, however, the CO again found that Employer had failed to establish the business necessity for the two year alternative experience requirement and denied certification (KAF 46-48).

Winner's Circle

In *The Winner's Circle*, 94-INA-544, Employer seeks an Italian Specialty Cook, and listed as job requirements two years experience in the job offered (Foreign Specialty Cook), or

² The following abbreviations shall be used: KAFⁿ, WAFⁿ, NAFⁿ, where KAF, WAF and NAF refers to the *Francis Kellogg* Appeal File, *Winner's Circle* Appeal File and *North Central* Appeal File, respectively, and the *n* represents the page in the Appeal File.

³ It is noted that the CO also challenged the live-in requirement, but that such was not preserved in the Final Determination and is not an issue here.

⁴ In *Information Industries, Inc.*, 88-INA-82 (Feb. 9, 1989) (*en banc*) we held that an employer can show business necessity by documenting that the requirement bears a reasonable relationship to the occupation in the context of the employer's business; and that the requirement is essential to performing, in a reasonable manner, the job duties as described by the employer.

⁵ It is noted that Employer submitted evidence to support the business necessity of the live-in requirement, but did not attempt to establish the business necessity of the alternative experience requirement.

two years experience as a Salad Maker, Italian Restaurant (WAF at 11-12). In the Notice of Findings (NOF)(WAF at 30-31), the CO states:

Although employer's requirement for two years experience in the job offered meets the Specific Vocational Preparation (SVP) requirement, the related experience requirement of two years exceeds the SVP, and is therefore, excessive and restrictive (WAF 30).

The CO then permitted Employer to rebut by "reducing requirements in the related occupation to the *D.O.T.* standard," or by documenting the business necessity of the alternative experience requirement. Employer submitted rebuttal which argued that work as a saladmaker in an Italian restaurant would educate the individual with the sauces and recipes that a cook utilizes to create the entrees with similar ingredients (WAF at 32-36). In the Final Determination, the CO found that Employer had not established that experience as a saladmaker beyond the SVP listed by the *D.O.T.* for that position would actually prepare a person for position as a cook (WAF at 37-39). Accordingly, the CO denied certification for failure to document business necessity. *Id.*

North Central

In *North Central Organized Regionally for Total Health*, 95-INA-68, Employer seeks a Nutritionist, and listed as educational job requirements a Bachelor of Science degree in Nutrition or an M.D. in Medicine. Employer also required one year experience in the job offered or one year experience in a "Medical Occupation" (NAF at 27-26). In the NOF the CO cited a violation of § 656.21(b)(2) and stated,

Your alternative requirements (Medical degree and 1 year experience in a medical occupation) are determined to be unduly restrictive because a degree in medicine does not provide the specialized educational background necessary to perform the job duties of a Nutritionist nor does 1 year working experience in a medical occupation, which is a generic term at best, permit an individual the opportunity to acquire the necessary skills and knowledge to perform the job duties indicated on the ETA 750 A form. It is clear from the alternative educational and the related experience noted on the document that the employer is mirroring the accomplishments of the foreign national beneficiary, and by indicating those accomplishments as alternative minimum requirements qualify the alien for the position.
(NAF 22).

Thus, the CO required Employer to establish business necessity for the alternative requirements or to eliminate the alternative/related requirements (NAF 21-23). Employer submitted rebuttal which attempted to establish business necessity and submitted the qualifications of the Alien (NAF at 9-20). In the Final Determination, the CO noted disbelief that an M.D. would want a job as a Nutritionist. In addition, the CO found that Employer has failed to explain how the alternative requirement of an M.D. in Medicine with one year experience in a medical occupation correlated with a position as a Nutritionist, pointing out that

experience in radiology or ophthalmology would fit Employer's description of its job requirement. Thus, the CO denied labor certification (NAF 6-8).

DISCUSSION

Underlying the analysis of the panel decisions in *Best Luggage*, *Henry L. Malloy* and other similar panel decisions is the assumption that the employer's proposed alternative education and experience requirements are "permissive alternatives" rather than primary job requirements. However, the regulations do not so provide. We recognize that all three of the cases before us today illustrate the situation that *Best Luggage* and its progeny tried to address. That is, an employer lists primary job requirements in compliance with § 656.21(b)(2), but then includes alternative job requirements which mirror the alien's job qualifications. Theoretically, including these alternative job requirements would increase the pool of qualified U.S. applicants. Thus, any U.S. applicant possessing these alternative job requirements can also apply. The regulations, however, do not explicitly provide for "permissive alternatives." Indeed, in our view, there exists no policy consideration which would warrant a rewriting of the regulations so as to treat "permissive alternatives" any differently than primary job requirements for a § 656.21(b)(2) analysis.

Although the CO focused on § 656.21(b)(2), the pertinent inquiry should focus on § 656.21(b)(5) which requires an employer to state its **actual minimum** requirements for the job opportunity.⁶ In each of these cases the employer has listed primary requirements which the CO has found are in compliance with § 656.21(b)(2), but which the alien does not meet. In *Kellogg*, the primary requirement is 2 years experience in the job of cook, and the alien has no experience as a full-time cook. In *The Winner's Circle*, the primary requirement is 2 years experience in the job of Italian Specialty Cook, and the alien has no experience as a full-time Specialty Cook. In *North Central*, the primary requirements are a Bachelor of Science degree in Nutrition and 1 year experience in the job of Nutritionist, and the alien does not have the degree in Nutrition. In each case, the alien only qualifies⁷ to apply for the position because of the alternate requirements.

Counsel for the CO argues in his reply brief that,

Taking a somewhat broader perspective, the Certifying Officers question whether the employer should ever be permitted to advertise a level of experience greater than that possessed by the alien. (CO reply brief at 4).

⁶ The regulation at 20 C.F.R. § 656.21(b)(5) provides:

(5) The employer shall document that its requirements for the job opportunity, as described, represent the employer's actual minimum requirements for the job opportunity, and the employer has not hired workers with less training or experience for jobs similar to that involved in the job opportunity or that it is not feasible to hire workers with less training or experience than that required by the employer's job offer.

⁷ In the *Kellogg* case the alien does not even appear to qualify under the alternate requirement, as found in the original panel decision. The matter was remanded for consideration of that issue, as it had not been raised by the CO.

We agree. Permitting an employer to advertise with qualifications greater than that possessed by the alien, but allowing the alien to qualify with lesser qualifications which are listed in the guise of “alternate” qualifications, is a violation of § 656.21(b)(5). Thus, we hold that any job requirements, including alternative requirements, listed by an employer on the ETA Form 750A must be read together as the employer’s stated minimum requirements which, unless adequately documented as arising from business necessity, shall be those normally required for the job in the United States, shall be those defined for the job in the *D.O.T.*⁸, and shall not include requirements for a language other than English (20 C.F.R. § 656.21(b)(2)). Therefore, we also hold that the “permissive alternative” job requirement analysis applied in *Best Luggage* is not in compliance with the regulations, and is overruled.

However, there are legitimate alternative job requirements, which can, and should be permitted in the labor certification process. For example, where an employer offers a job as a computer programmer, either a degree in computer science or mathematics, or even programming experience without a degree, might be considered as equivalent, and thus equally acceptable, in a given case. But, these alternatives must be substantially equivalent to each other with respect to whether the applicant can perform in a reasonable manner the duties of the job being offered. Thus, where an employer’s primary requirement is considered normal for the job in the United States and the alternative requirement is found to be substantially equivalent to that primary requirement (with respect to whether the applicant can perform in a reasonable manner the duties of the job offered), the alternative requirement must also be considered as normal for a § 656.21(b)(2) analysis.

Further, as we have noted, in all three of these cases the alien does not meet the primary job requirements, but only potentially qualifies for the job offered because the employer has chosen to list alternate job requirements. Indeed, such is true in the entire line of alternate requirement cases such as *Best Luggage* and its progeny. In such cases, it may be easily argued that there are other equally suitable combinations of education, training or experience which could qualify an applicant to perform the duties of the job offered in a reasonable manner, but which have not been listed on the ETA 750A as acceptable alternatives. Thus, U.S. applicants who possess such other qualifications are excluded from applying for the job offered. This clearly raises the issue of whether the alternate job requirements are unlawfully tailored to the alien’s qualifications. This may be true even if the alternate requirements are substantially equivalent to the first requirements and even if the requirements otherwise comply with § 656.21(b)(2).

Therefore, we hold that where the alien does not meet the primary job requirements, but only potentially qualifies for the job because the employer has chosen to list alternative job requirements, the employer’s alternative requirements are unlawfully tailored to the alien’s qualifications, in violation of § 656.21(b)(5), unless the employer has indicated that applicants with any suitable combination of education, training or experience are acceptable.

⁸ The job requirements listed in *D.O.T.* definitions are found in the definition trailer. Those requirements relate to levels of physical demands, general educational development, and specific vocational preparation.

Therefore, all of the cases *sub judice* must be reconsidered and will be remanded to the CO for issuance of a new Notice of Findings consistent with this decision. In issuing the Notice of Findings in each case, the CO is also directed to consider the following with respect to each case:

Kellogg

1. The requirement of “2 years in the job offered” (household cook) is a requirement for 2 years experience in the job duties of a cook, which is within the SVP (1 to 2 years) for the position of household cook. Thus, it is not disputed that the requirement of 2 years in the job offered complies with § 656.21(b)(2). The alternate experience requirement of “2 years as a live-in housekeeper with cooking experience” was found by the CO to be excessive and unduly restrictive. However, that finding by the CO is based upon the fact that the SVP for the position of housekeeper is up to 3 months experience. It is true that, if this application were for the position of housekeeper, a requirement of 2 years experience would exceed the SVP and would be unduly restrictive. However, the position in question is that of a cook and not a housekeeper. As such, the SVP for the position of housekeeper is irrelevant. Thus, the CO’s finding that the alternative experience is excessive (and therefore, unduly restrictive) **because it exceeds the SVP for the position of housekeeper** is rejected.
2. The employer’s alternate job requirements are not substantially equivalent to each other with respect to whether the applicant is able to perform the job duties in a reasonable manner. While the position of “housekeeper with cooking duties” does have the component of some cooking experience, it is not substantially equivalent to full-time experience as a cook **with respect to whether an applicant has the ability to perform the duties of the job offered (cook) in a reasonable manner**. Thus, the employer’s requirements (when read together as the minimum requirements for the job) are not substantially equivalent, but are internally inconsistent and illogical. They must be read as if they stated, “2 years experience as a full-time cook or 2 years experience in another job with less than full-time cooking duties.” Since the **cooking** experience gained during 2 years as a housekeeper is less than the cooking experience gained during 2 years as a cook, the experience requirements do not state the employer’s actual minimum requirements, in violation of § 656.21(b)(5).
3. The alien does not meet the primary job requirements, but only potentially qualifies for the job because the employer has chosen to list alternative job requirements. However, the job has not been offered so that applicants who have comparable cooking experience as the result of other suitable combinations of education, training or experience would be permitted to apply. Therefore, it appears that the job requirements have been tailored to the alien’s qualifications in violation of § 656.21(b)(5).
4. The CO is instructed on remand to consider whether the alien even qualifies for the position (as instructed in the original panel decision). Our review of the record indicates that the Alien may never have served in the position of cook and has less than two years of experience working as a housekeeper for employers other than the Employer listed on

the application. Moreover, it appears that the Alien has worked for the Employer since 1988, and appears to have gained the requisite two years of experience as a houseworker, at least in part, from her work with the Employer in violation of Section 656.21(b)(5).

Winner's Circle

1. Employer listed the experience requirements of 2 years in the job offered (Italian Specialty Cook) or 2 years in the related occupation of Saladmaker, Italian Restaurant. Clearly, the requirement of 2 years in the job offered is within the SVP for the position of "Cook, Specialty Foreign Food." However, the CO found that the alternative experience requirement was excessive and unduly restrictive based upon the fact that the SVP for the position of saladmaker is three to six months, while the employer's requirement is two years. It is true that, if this application were for the position of saladmaker, a requirement of 2 years experience would exceed the SVP and would be unduly restrictive. However, the position in question is that of a specialty cook and not a saladmaker, and the SVP for the position of saladmaker is irrelevant. Thus, the CO's finding that the alternative experience is excessive (and therefore, unduly restrictive) **because it exceeds the SVP for the position of saladmaker** is rejected.
2. When the duties of Salad Maker⁹ are compared to the duties of Cook, Specialty, Foreign Food¹⁰, within the *D.O.T.*, it appears that they are not substantially equivalent to each other with respect to whether an applicant is able to perform the job duties in a reasonable manner. Therefore, the experience requirements do not state the employer's actual minimum requirements, in violation of § 656.21(b)(5).
3. The alien does not meet the primary job requirements, but only potentially qualifies for the job because the employer has chosen to list alternative job requirements. However, the job has not been offered so that applicants who have comparable cooking experience as the result of other suitable combinations of education, training or experience would be

⁹ Pantry Goods Maker (hotel & rest.)(317.684-014) Prepares salads, appetizers, sandwich fillings, and other cold dishes: Washes, peels, slices, and mixes vegetables, fruits, or other ingredients for salads, cold plates, and garnishes. Carves and slices meats and cheese. Portions and arranges food on serving dishes. Prepares fruit or seafood cocktails and hors d'oeuvres. Measures and mixes ingredients to make salad dressings, cocktail sauces, gelatin salads, cold desserts, and waffles, following recipes. Makes sandwiches to order [SANDWICH MAKER (hotel & rest.) 317.664-010]. Brews tea and coffee [COFFEE MAKER (hotel & rest.) 317.684-010]. Prepares breakfast and dessert fruits, such as melons, grapefruit, and bananas. Portions fruit sauces and juices. Distributes food to waiters/waitresses to serve to customers. May serve food to customers. May be designated **Salad Maker** (hotel & rest.) when specializing in making salads.

¹⁰ Cook, Specialty, Foreign Food (hotel & rest.) (313.361-030) Plans menus and cooks foreign-style dishes, dinners, desserts, and other foods, according to recipes: Prepares meats, soups, sauces, vegetables, and other foods prior to cooking. Seasons and cooks food according to prescribed method. Portions and garnishes food. Serves food to waiters on order. Estimates food consumption and requisitions or purchases supplies. Usually employed in restaurant specializing in foreign cuisine, such as French, Scandinavian, German, Swiss, Italian, Spanish, Hungarian, and Cantonese. May be designated according to type of food specialty prepared as Cook, Chinese-Style Food (hotel & rest.); Cook, Italian-Style Food (hotel & rest.); Cook, Kosher-Style Food (hotel & rest.); Cook, Spanish-Style Food (hotel & rest.).

permitted to apply. Therefore, it appears that the job requirements have been tailored to the alien's qualifications, in violation of § 656.21(b)(5).

North Central

1. The alien does not meet the primary job requirements, but only potentially qualifies for the job because the employer has chosen to list alternative job requirements. However, the job has not been offered so that applicants who have comparable qualifications for the position of Nutritionist as the result of other suitable combinations of education, training or experience would be permitted to apply. Therefore, it appears that the job requirements have been tailored to the alien's qualifications, in violation of § 656.21(b)(5).

ORDER

The panel decisions in the matters of Francis Kellogg, 94-INA-465, the Winner's Circle, 94-INA-544 and North Central Organized Regionally for Total Health, 95-INA-68, are hereby **VACATED**, and these cases are hereby **REMANDED** for further consideration in light of this opinion.

For the Board:

RICHARD E. HUDDLESTON
Administrative Law Judge